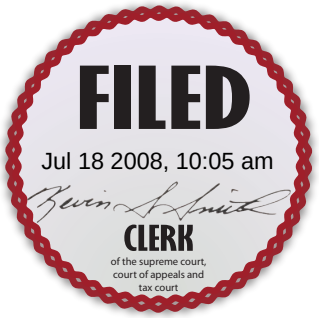

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IN THE
COURT OF APPEALS OF INDIANA

CHRIS MCGEHEE,	)	
	)	
Appellant-Defendant-Cross-Appellee,	)	
	)	
vs.	)	No. 88A01-0802-CV-69
	)	
TRAVIS ELLIOTT and TAMARA ELLIOTT,	)	
	)	
Appellees-Plaintiffs-Cross-Appellants.	)	

APPEAL FROM THE WASHINGTON SUPERIOR COURT
The Honorable Frank Newkirk, Jr., Judge
Cause No. 88D01-0204-PL-88

July 18, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant-cross-appellee Chris McGehee appeals the trial court's order awarding appellees-plaintiffs-cross-appellants Travis and Tamara Elliott (collectively, the Elliotts) $10,000 in attorney fees. Specifically, McGehee contends that the trial court awarded the Elliotts an arbitrary amount that is not supported by the evidence. Additionally, the Elliotts cross-appeal the trial court's order awarding them $5,000 in damages, arguing that the award is clearly erroneous. Finding no error, we affirm the judgment of the trial court.

FACTS

As we reported in the parties' first appeal:

> On April 1, 2000, the Elliotts entered into a purchase agreement with McGehee to buy a 68.211-acre tract of land ("Tract 2") in Washington County, Indiana. The Purchase Agreement contained the following provision regarding the adjoining tract of land ("Tract 3"): "Buyers to have a ten day first right of refusal on the adjoining 64.69 acres on the South side of the 68.211 acres. The agreed upon sale price of $115,000. This Agreement will expire on April 1, 2002. The adjoining property will remain on the market for sale." The real estate agency for the sale was Landmark Realty, and Alice McIntosh was the principal broker while Leonard McCracken was the agent dealing directly with the Elliotts.
>
> On May 18, 2000, McGehee conveyed Tract 2 to the Elliotts by a deed that provided: "BUYER HAS INSPECTED PROPERTY AND UNDERSTANDS THAT IT IS SOLD 'AS IS.'" The deed also contained certain restrictive covenants, including a restriction that limited agricultural usage of the land to "only one animal per acre," excluding household pets. Tract 3 was also subject to this restrictive covenant. The Elliotts, who raise sheep, desired to have more than one animal per acre, and McGehee issued a deed of correction without the restrictive covenants. A ditch or ravine splits the front twenty acres of Tract 2 from the back forty-eight acres. The Elliotts were aware of the ditch or ravine at the time they purchased Tract 2. According to Tamara, she was given permission to use a road on

> Tract 3 to access the back forty-eight acres of Tract 2 while Tract 3 remained in McGehee's ownership.
>
> In late 2000 or early 2001, McGehee received an offer on Tract 3 from John Hasewinkel. An employee of McGehee communicated the offer to McIntosh, and McGehee also asked McIntosh whether the Elliotts would be exercising their right of first refusal. McIntosh told McGehee that the Elliotts would not be able to purchase Tract 3. However, the Elliotts did not receive notice of the offer on Tract 3. On January 23, 2001, McGehee sold Tract 3 to John Hasewinkel for $116,280.00 subject to the animal limitation restrictive covenant.
>
> In the spring of 2001, the Elliotts became aware that Tract 3 had been sold. As a result, the Elliotts filed a complaint against McGehee on April 17, 2002, for breach of contract. The Elliotts requested damages for breach of contract, lost profits, court costs, and attorney fees. McGehee filed an answer and affirmative defenses claiming, in part, that the Elliotts' claim was barred by merger, waiver, and estoppel.

McGehee v. Elliott, 849 N.E.2d 1180, 1182-83 (Ind. Ct. App. 2006) (internal citations omitted) (McGehee I). After a bench trial, the trial court found that the parties were bound by the contract they entered into on April 1, 2000, and that the Elliotts had sustained substantial damage when McGehee breached that contract.[1] Thus, the trial court entered judgment in favor of the Elliotts and awarded them $317,236 in damages and $5,000 in attorney fees.

On appeal, McGehee argued that (1) the trial court erred by finding that he had breached his contract with the Elliotts, and (2) the trial court's damages award was clearly erroneous. After analyzing the parties' agreement, we concluded that the trial court's finding that McGehee had breached the agreement was not clearly erroneous.

[1] The parties' contract contained a clause awarding attorney fees to a non-breaching party if the contract was breached. McGehee I, 849 N.E.2d at 1185.

However, we concluded that the trial court had improperly calculated the Elliotts' damages and that, instead, "the general measure of damages for a seller's failure or refusal to convey land is usually based on the difference between the contract price and the fair market value of the land at the time of the breach, plus the return of any payment made with interest." Id. at 1190 (citing Arlington State Bank v. Colvin, 545 N.E.2d 572, 575 (Ind. Ct. App. 1989)). Thus, we found the damages award to be clearly erroneous and remanded for further proceedings consistent with the opinion. We also urged the trial court to reconsider the amount of the attorney fees award, noting that the "only evidence presented regarding the Elliotts' attorney fees was Tamara Elliott's trial testimony that they had incurred between five and eight thousand dollars at that time." McGehee I, 849 N.E.2d at 1191 n.4.

On November 7, 2007, the trial court heard new evidence regarding the Elliotts' damages and attorney fees. On December 20, 2007, the trial court issued, in pertinent part, the following order:

> 2. There was no evidence presented to determine the amount of consideration paid for the first right of refusal.
>
> 3. The Court has considered the appraisal completed by Ervin Day in determining a market value of One Hundred Twenty Thousand Dollars ($120,000). . . .
>
> 4. In applying the measure of damages set forth by the Court of Appeals, Judgment should be entered for the Elliotts against Mr. McGehee for Five Thousand Dollars ($5,000.00), being the difference between the contract price Elliotts agreed to pay Mr. McGehee, and the fair market value of the Hasewinkel Tract.
>
> ***
>
> 6. Although the only evidence of attorney's fees in the original action was a statement by Tamara Elliott that they had incurred fees between five and

> eight thousand dollars; detailed additional evidence now shows that the Plaintiff's attorney fees total Ten Thousand Two Hundred Nineteen and 74/100 Dollars including costs.
>
> ***
>
> IT IS THEREFORE ORDERED, ADJUDGED, and DECREED, in compliance with the directive of the Indiana Court of Appeals, and in conformity to the evidence presented, that judgment be entered in favor of the [Elliotts] and against [McGehee] in the amount of FIVE THOUSAND DOLLARS ($5,000.00), plus attorney fees of TEN THOUSAND DOLLARS ($10,000.00) and court costs of ONE HUNDRED FOUR DOLLARS ($104.00); this $15,104.00 Judgment shall bear interest at 8% per year.

Appellant's App. p. 14-16. McGehee now appeals the trial court's attorney fee award and the Elliotts cross-appeal the trial court's damages award.

DISCUSSION AND DECISION

I. Attorney Fee Award

On remand, the trial court awarded the Elliotts $10,000 for attorney fees. McGehee argues that the evidence does not support this award.

A contract that allows for the recovery of reasonable attorney fees will be enforced according to its terms unless it violates public policy. Harrison v. Thomas, 761 N.E.2d 816, 821 (Ind. 2002). We review a trial court's award of attorney fees for an abuse of discretion. Prime Mortgage USA, Inc. v. Nichols, 885 N.E.2d 628, 660 (Ind. Ct. App. 2008). We will not reverse a trial court's order unless the appellant can show clear error. Id. As we have previously held,

> [i]n considering the reasonableness of an attorney's fee, it makes no difference whether the obligation to pay the fee is based on a statutory provision or on a prior agreement. Instead, the determination of reasonableness of an attorney's fee requires consideration of all relevant circumstances; our Indiana Professional Conduct Rule has provided a

> useful, non-exclusive, list of factors for a trial court to consider when evaluating the reasonableness.

Boonville Convalescent Center, Inc. v. Cloverleaf Healthcare Servs., Inc., 834 N.E.2d 1116, 1127-28 (Ind. Ct. App. 2005).

On remand, the Elliotts' attorney, Larry Medlock, testified and entered bills detailing the legal work he had performed for the Elliotts' into evidence. Appellant's App. p. 19-36. While McGehee admits that those bills totaled $10,219.74, appellant's br. p. 4, he emphasizes that $1,115.34 of that amount was "costs . . . even includ[ing] postage for every item mailed during the pendency of this case." Id. Thus, McGehee argues that the trial court erred by "award[ing] an arbitrary amount of Ten Thousand ($10,000.00) Dollars." Id. McGehee does not direct us to caselaw supporting his position that the trial court abused its discretion by considering costs, such as postage, when awarding the Elliotts attorney fees. Because the attorney fee award was within the scope of the evidence presented, we conclude that the trial court did not abuse its discretion when it awarded the Elliotts $10,000 in attorney fees.

II. Cross-Appeal

The Elliotts challenge the trial court's findings of facts and conclusions of law on cross-appeal. Specifically, the Elliotts argue that the trial court ignored Rosemary Trinkle's testimony regarding the valuation of the property, various findings of fact are not supported by the evidence, the second conclusion of law is erroneous, the trial court misapplied the damages holding in McGehee I, and McGehee I "has established poor public policy." Appellees' Br. p. 19.

We employ a limited standard of review when addressing challenges to a trial court's award of damages. Nichols, 885 N.E.2d at 656. "No degree of mathematical certainty is required in awarding damages as long as the amount awarded is supported by evidence in the record." Id. We do not reweigh the evidence or judge the credibility of witnesses and we will only consider the evidence favorable to the award. Id. Instead, we will affirm if the damages award is within the scope of evidence before the fact finder. Id.

The majority of the Elliotts' argument focuses on their belief that the trial court "failed to consider relevant evidence presented by a qualified, reputable real estate agent and undue weight was placed upon the testimony of the appraiser presented by McGehee." Appellees' Br. p. 3-4. The Elliotts critique McGehee's appraiser—Ervin Day—and assert that their real estate agent—Trinkle—"looked at more real estate than Ervin Day" and it was "inappropriate [for the trial court] to give no weight to Rosemary T[r]inkle's opinion as to the fair market value . . . ." Id. at 10.

After conducting an appraisal, Ervin Day found the fair market value of the real estate at issue to be $120,000. Ex. B. The Elliotts admit that "[b]oth Ervin Day and Rosemary Trinkle are qualified to provide a fair market value on real estate and both performed the research and went through the comparables that are typically examined when rendering an opinion as to the fair market value." Id. Day appraised the real estate at $120,000 and the trial court accepted this value. The Elliotts' argument is an invitation for us to reweigh the evidence that was before the trial court—a request we must deny when reviewing the appropriateness of a damages award on appeal.

The Elliotts also challenge the trial court's conclusion that no evidence was presented regarding the amount of consideration, if any, that the Elliotts paid for the right of first refusal. The parties' purchase agreement contained the following provision regarding the adjoining tract of land: "Buyers to have a ten day first right of refusal on the adjoining 64.69 acres on the South side of the 68.211 acres. The agreed upon sale price of $115,000. This Agreement will expire on April 1, 2002. The adjoining property will remain on the market for sale." McGehee I, 849 N.E.2d at 1182. In the parties' first appeal, we remanded to the trial court for it to recalculate the Elliotts' damages. Specifically, we provided that "the general measure of damages for a seller's failure or refusal to convey land is usually based on the difference between the contract price and the fair market value of the land at the time of the breach, plus the return of any payment made with interest." Id. at 1190.

The Elliotts argue that they presented evidence that "the first parcel would not have been purchased but for the opportunity to purchase the second tract. Payment was made. The law requires return of the payment . . . ." Appellees' Br. p. 16 (internal citation omitted). Thus, the Elliotts imply that their total payment for the first parcel—$120,000—should be deemed consideration for the right of first refusal. This argument is nonsensical. Because the Elliotts did not present evidence regarding an amount of consideration they specifically paid for the right of first refusal, the trial court did not err

by not including it in the damages award.[2] In sum, the trial court calculated the Elliotts' damages pursuant to our instructions upon remand. Thus, we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.

[2] The Elliotts also challenge the soundness of our decision in McGehee I and argue that it has established poor public policy. However, the Elliotts failed to move for rehearing or file a petition to transfer after we issued that decision. Thus, we are bound by our previous decision by the law of the case doctrine and we will not address the Elliotts' argument. Montgomery v. Trisler, 814 N.E.2d 682, 684 (Ind. Ct. App. 2004) (holding that an appellate court's determination of a legal issue is binding on a subsequent appeal under the law of the case doctrine).